CAUGHMAN LUMBER, INC.

IBLA 94-793 Decided January 22, 1998

Appeal from a trespass action of the Canon City District Office, Bureau of Land Management, levying trespass costs for the unauthorized removal of forest products from the public lands (CO-050-7463) and for the unauthorized maintenance of a BLM road (COC-54661).

Affirmed in part, set aside and remanded in part, and reversed in part.

1. Trespass: Generally--Trespass: Measure of Damages

   Under 43 C.F.R. § 9239.0-7, the unauthorized severance or removal of timber and forest products from public lands under the jurisdiction of the Department of the Interior is an act of trespass. However, when computing the amount of damages properly assessed for nonwillful trespass, the salvage value of timber remaining on Government land is properly deducted from the amount otherwise due under the regulations.

2. Trespass: Generally--Trespass: Measure of Damages

   Where the record before the Board fails to establish that the damages assessed for unauthorized maintenance of a right-of-way are fairly ascribable to the actions cited in the a notice of trespass, the damage assessment will be reversed.

APPEARANCES: Franklin E. Lynch, Esq., Colorado Springs, Colorado, and Leslie G. Caughman, Florence, Colorado, for Caughman Lumber, Inc.; Brock Wood, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Caughman Lumber, Inc. (Caughman), acting through Leslie G. Caughman its president, has appealed from a determination issued by the Canon City District Manager, Bureau of Land Management (BLM or the Bureau), on June 28, 1994, assessing damages for the unauthorized removal of forest products from the public lands and for the unauthorized commercial use and maintenance of a BLM road.

With respect to the timber trespass, serialized as CO-050-7463, the record indicates that, on February 2, 1994, BLM advised Caughman that it was initiating trespass proceedings based upon an allegation that Caughman or its employees had cut and removed ponderosa pine from the public lands in the SW¼NW¼ sec. 7, T. 50 N., R. 11 E., New Mexico Principal Meridian (NMPM), and spruce and aspen from the public lands in the SE¼NE¼ sec. 18, T. 50 N., R. 11 E., NMPM. Caughman was afforded 30 days in which it could present evidence to disprove the allegation. Further, Caughman was apprised that a final summary of the wood removed would not be issued until "late spring" because of snow "covering most of the spruce stumps" at the present time.

The record does not reflect that Caughman responded to the trespass charges at that time. A statement of damages was subsequently prepared, based upon an evaluation that 8.2 thousand board feet of sawtimber and 17.7 hundred cubic feet of aspen products other than logs had been improperly removed. Total trespass damages of $6,620.78 were computed as follows: Fair market value of products removed (times two to reflect that the violation was nonwillful) - $4,039.86; Rehabilitation costs - $1,011.92; Administrative costs - $1,175.30; Indirect administrative costs - $393.70.

On March 7, 1994, BLM apprised Caughman of a separate trespass action (COC-56441) for "unauthorized road maintenance on the BLM road leading from County Road 12 to 'Black's Cabin.'" This road is located on public lands in secs. 7 and 8, T. 50 N., R. 11 E., NMPM, and provides access to a cabin owned by Frank Black. In the letter accompanying the Trespass Notice, BLM averred that Caughman had "been advised on several occasions that you may not build or improve or maintain roads on BLM land without an easement. You likewise may not plow snow or use this road for commercial use without an easement." Again, Caughman was provided 30 days in which to present rebuttal evidence and was informed that "once the snow from the adjacent land has melted," Caughman would be assessed for any damage that "has occurred from this operation." Caughman did not respond, according to the record, and liability in the amount of $1,194.07 for rehabilitation costs was subsequently imposed by BLM.

Notwithstanding its previous failure to challenge the factual predicates of BLM's trespass notices, Caughman has disputed the factual basis of both BLM charges in its Statement of Reasons (SOR) for appeal:

> Mr. Caughman and Caughman Lumber, Inc. deny ever purposely and intentionally removing timber from any portion of BLM land without a contract.
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> With respect to the trespass against Caughman Lumber for alleged unauthorized commercial use and maintenance of a BLM road, Caughman Lumber states that the majority of the road in question lies upon land owned by Dr. Frank Black. Dr. Black had

> asked Mr. Caughman of Caughman Lumber to clear out the road from snow and other debris so that [Dr.] Black could get into his property. No portion of the short stretch of the road that is located on BLM property was damaged. In fact, the condition was enhanced. It is our understanding that it has been standard practice for several years that land owners in the area have plowed the BLM roads to allow access from their property to public roadways. Mr. Caughman's actions in plowing the road allowed access to Dr. Black's property and made the BLM road that was otherwise impassable, passable.

(SOR at 1-2.) 1/

In response, BLM asserted that, insofar as the timber trespass was concerned, an analysis of Caughman's arguments showed that "Caughman does not deny that it removed" the sawtimber and aspen products but simply disavowed "purposely and intentionally removing timber from any portion of BLM land without a contract." Pointing out that Caughman had been assessed for "nonwillful" trespass, BLM argued that Caughman's statements did not rebut the allegations and that Caughman had failed to even proffer any evidence which would disprove the fact that it cut down timber on BLM land without authorization.

With respect to the road trespass, BLM argued that Caughman did not deny plowing or grading the road in question but merely demurred that its actions "enhanced" rather than damaged the road. Claiming that Caughman subsequently bladed the road and removed all water control features and created an outside berm, actions which, BLM contended, would inevitably lead to future road destabilization, BLM argued that Caughman's actions warranted the trespass charges and that Caughman had failed to demonstrate otherwise. Finally, with respect to the amounts assessed, BLM noted that Caughman had neither shown nor alleged that damages and costs were incorrectly calculated or improperly included.

In response, Caughman challenged the assertions made by BLM and specifically denied "the essential facts claimed by the BLM in its trespass CO-050-7463 and trespass COC-56441." Caughman reasserted its contention

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1/ The Bureau's decision had also alluded to a second timber trespass charge (CO-050-7464) and actions which BLM had taken to suspend an existing timber sale contract held by Caughman (CO-050-TS3-01). Caughman attempted to raise both of these issues in the context of this appeal. However, since BLM made no determination of liability against Caughman with respect to the second trespass allegation, but rather referred that matter to the U.S. Attorney's Office for review, there is no justiciable issue to be addressed herein. With respect to the timber sale, we note that BLM terminated the suspension prior to the appeal, and that matter is therefore moot.

that its work on the road, done at the request of Black, did no damage, denied that it removed any erosion control structures, and argued that the road "is in no worse shape that it was prior to Caughman plowing the snow from it." Caughman also argued that, since it had not removed any sawtimber or aspen products from the areas under dispute, it could not be held liable for the claimed trespass. 2/

In its final reply, BLM argued that Caughman had presented a series of simple denials unsupported by proffers of evidence. Responding to Caughman's suggestion that its failure to remove the downed timber absolved it of liability, BLM noted that the timber trespass occurred when Caughman severed vegetative materials on public land without authorization, regardless of whether or not it thereafter removed those materials. Similarly, insofar as the road work was concerned, BLM noted that that trespass occurred when Caughman worked on the road without authorization. Thus, BLM continued, Caughman's denials of BLM's claim that it had damaged the water bars and created a berm were legally irrelevant since the predicate facts of the trespass, work on BLM roads without authorization, was admitted.

[1] The first trespass action to consider is the timber trespass. Under the applicable regulations, 43 C.F.R. § 9239.0-7, the unauthorized extraction, severance, injury, or removal of timber from public lands under the jurisdiction of the Department of the Interior is an act of trespass for which damages are properly assessed. Thus, when BLM discovers that timber has been severed or removed, without permission, from lands under its management, it may properly deem such action to be a trespass. See, e.g., John Williams, 139 IBLA 186 (1997); Fred Wolske, d.b.a. F.K.W. Logging Co., 137 IBLA 211 (1996).

Appellant suggests that its failure to remove the timber somehow fatally compromises BLM's case. This is simply not correct. Departmental regulations expressly provide that the unauthorized "severance * * * of timber * * * from public lands * * * is an act of trespass." 43 C.F.R. § 9239.0-7. Thus, the mere act of severance of timber from Federal land without authorization constitutes trespass, regardless of whether or not the timber is ultimately removed from Federal land. See J.W. Weaver, 124 IBLA 29, 33 (1992). Caughman's suggestion that it may not be charged trespass damages for this timber because it did not remove the downed trees is emphatically rejected.

While Caughman does challenge any suggestion that it intentionally cut down trees on Government land without authorization, not once does it

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2/ On this point, we would note that Caughman's failure to remove the severed timber supports the conclusion that, at least insofar as this trespass is concerned, Caughman does not seriously dispute that the timber which it cut was, in fact, located on Government property.

specifically assert that no trespass occurred. 3/ Nor does it at any point challenge the Government's estimate of the amount of timber that was cut. Regardless of how unintentional a trespass might be, the Government is still properly compensated for the damage to its property and resources. And, in this regard, under the regulation adopted in 1991, 43 C.F.R. § 9239.1-3(a), 56 Fed. Reg. 10173 (Mar. 11, 1991), certain minimum damages for a timber trespass are required, even if the trespass is deemed nonwillful. Those minimum damages which must be recovered are: (1) administrative costs incurred as a result of the trespass; (2) costs associated with the stabilization or rehabilitation of any damage which occurred as a result of the trespass; and (3) twice the fair market value of the resource where the trespass is deemed nonwillful. Id. Thus, even though the cutting of the timber may have been deemed inadvertent, the amount being assessed by BLM is the minimum required by the regulations.

This does not end the matter, however. While the fact that the severed timber was not removed by Caughman does not affect the determination of whether a trespass has occurred, it is relevant to the question of the damages which may be recouped. This issue was originally addressed in the context of the pre-1991 regulations in David Robinson, 36 IBLA 386 (1978).

The decision in Robinson involved the assessment of damages for a timber trespass deemed to be "willful." The fact of the trespass was not generally in dispute. Thus, while Robinson, who owned a number of mining claims on which trees had been cut, made various general allegations that some of the timber had been felled by third parties, the Board noted that he did not "expressly deny on appeal that he cut down trees located on his mining claims." Id. at 387. The Bureau had assessed treble damages for the cut timber, having recourse to Oregon State law as permitted by the then-existing regulations, 43 C.F.R. § 9239.0-8 (1977), to determine the damages for willful timber trespass. In its decision, the Board affirmed both the finding that the trespass was willful and the use of Oregon State law to determine the level of damages assessed. But in Robinson, as is apparently true in the instant case, the cut timber had not been removed and sold by the trespasser. On the contrary, in Robinson, the felled trees were flagged and posted as Government property. And it is on this aspect that the Board's decision in Robinson has the most bearing on the present appeal.

In Robinson, the Board described the prevailing practice for the computation of damages for willful trespass as follows: "After actual damages are computed, they are first trebled, and then from this amount is

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3/ In this regard, Caughman's position with respect to this trespass claim could be contrasted with the position which it took with respect to the other timber trespass claim (CO-50-7464) in which it did question whether or not any trespass had occurred. The general denial contained in Caughman's last submission is simply inadequate to fairly or timely put the fact of trespass into dispute.

subtracted an allowance for such salvage as the BLM by its own diligence realized or could have realized." Id. at 391. The Board then provided the rationale for this approach by quoting from the decision of the Oregon Supreme Court in United States v. Firchau, 380 P.2d 800 (1963):

> The principle of mitigation, or, more properly, of the duty of a plaintiff to avoid reasonably avoidable losses following a trespass, is not a part of the statutory scheme expressed in ORS 105.810 and 105.815. It is a principle of common law that has been adopted by the courts because justice requires it. There is no reason why this principle should not apply in statutory trespass cases. Generally, a victim of a trespass may not sit idly by and permit the damages caused by a trespass to be compounded by natural elements or by other causes if, in the exercise of slight care, he could prevent such enhanced injury to his land.

Id. at 804.

In the case at bar, we note that while the original trespass charge asserted that the sawtimber and other wood products had been removed, on appeal Caughman has vehemently denied that this was the case. See Reply of Caughman Lumber, Inc., at 1. We note that, though BLM filed a response to this Reply, it did not directly contravene Caughman's factual assertion that it had not removed the cut timber. Assuming such is the case, we believe that BLM is required, particularly since it admits that this is a nonwillful trespass, 4/ to adjust the amount assessed to reflect the salvage value of the unremoved timber which was or could have been obtained. Accordingly, while we affirm the finding of trespass in

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4/ The injustice of not allowing a deduction for the salvage value of the timber remaining on Federal lands in cases of nonwillful trespass is particularly pronounced because of the 1991 regulatory amendments. Prior to those amendments, the regulations provided that "[i]n case of innocent trespasses neither the trespassers nor their transferees shall be required to pay more than the stumpage value, or the value of the timber in standing trees taken by them as damages to the Government." 43 C.F.R. § 9239.1-3(b) (1990). The 1991 amendments sought to double the amount which "innocent" or "nonwillful" trespassers could be charged based on the fear that "[w]ithout some penalty for nonwillful trespass, an unscrupulous operator could 'nonwillfully' obtain additional timber and, if he got caught, would only have to pay the value of the timber taken." 56 Fed. Reg. 10174 (Mar. 11, 1991). Leaving aside the obvious conundrum that intentional acts by operators, be they scrupulous or unscrupulous, are, by definition, not "nonwillful," it is still clear that the doubling of the value of the timber is, itself, justified on the presumption that the nonwillful trespasser has obtained the actual value of the timber in the first instance. To not allow a salvage value when the timber has not been removed might be, in effect, to charge a nonwillful trespasser with treble damages, thereby violating the clear regulatory intent to treat willful trespasses more harshly than those deemed nonwillful.

CO-050-7563, we will set aside the demand for $6,620.78 and remand the matter to BLM for recomputation of the amount claimed with due allowance being made for the salvage value which BLM realized or could have realized.

[2] The second allegation of trespass concerns the unauthorized maintenance 5/ of a road traversing BLM land. Appellant does not deny that it plowed snow from the road but contends that it removed the snow at the behest of a local resident (Frank Black) and that, in any event, the road was not damaged. Further, Caughman argues that Black has maintained this road without interference or help from BLM for many years, and BLM had never previously objected.

Black personally contacted BLM in response to the Trespass Notice to assert, inter alia, that (1) there had been no more damage to the road than in years past; (2) most of the damage had been caused by "pick-up trucks," since this section of the road was where they often got "stuck" in the clay soil; and (3) that Leslie Caughman had plowed the road at Black's request. Black also asserted that he had been maintaining the road for the last 51 years "without any assistance from the Dept. of Interior or BLM" and that he had paid $800 the previous year to grade the road and have the water bars put in. (Letter of July 8, 1994.) In an ensuing letter, Black noted that various neighbors were willing to testify that no damage had been done to the road and requested that the damage action against Caughman be dismissed. He also requested issuance of a formal "easement" for the road. (Letter of Aug. 2, 1994.) For the reasons set forth below, we have determined to vacate this Trespass Notice.

Under the right-of-way regulations found at 43 C.F.R. § 2801.3(a), occupancy or development of the public lands in a manner that requires a right-of-way, temporary-use permit, or other authorization without first obtaining the required authorization is an act of trespass. See Douglas Noland, 139 IBLA 337 (1997). The regulation at 43 C.F.R. § 2800.0-5(u) defines trespass as "any use, occupancy or development of the public lands or their resources without authorization * * *, or which exceeds such authorization or which causes unnecessary or undue degradation of the land or resources."

5/ The District Office had characterized this trespass action as one based on "unauthorized commercial use and maintenance of a BLM road." We note, however, that nothing in the Mar. 7, 1994, Trespass Notice referred to commercial use. That notice was solely limited to "unauthorized maintenance." While there is a note to the record which indicates that, on May 23, 1994, the BLM forester may have seen Caughman hauling lumber over this road without authorization, we do not believe that this action can properly be covered under the March Trespass Notice. Similarly, as we explain in the text, the allegation that Caughman bladed the road in late April 1994 is not properly subsumed within the original Trespass Notice. Thus, in our view, the only matter properly before the Board is Caughman's plowing of the snow on Mar. 4, 1994.

In its statement of damages, BLM described the harm caused by removal of the snow cover on "Black's Road":

> Removal of the snow cover resulted in your early use (unauthorized commercial use) of the road, resulting in heavy rutting, resulting in you or those in your employ again blading the road during the week of April 17. This second blading removed all erosion control structures from the road and left a berm to be removed.

It is clear from the foregoing that it is BLM's position that the removal of the snow cover allowed Caughman subsequent unauthorized commercial access to the road, which access resulted in rutting of the road, causing Caughman to blade the road in mid-April, thereby removing erosion control structures (water bars) and leaving a berm. It is the cost of replacing the water bars and removing the berm for which BLM seeks compensation. There are, however, a number of problems with BLM's position.

First of all, if Caughman subsequently used the road without authorization and also subsequently bladed the road, these were clearly separate, independent acts of trespass. See Courtney Ayers, 122 IBLA 275 (1992). They are not, however, properly subsumed under a trespass notice which is directed to plowing snow off of a road. In effect, the original Trespass Notice charged Caughman with one violation but the final decision assessed penalties properly arising under a subsequent alleged violation for which Caughman was never charged. The attempt to recoup the cost of reestablishing water bars and removing the berm based on actions in mid-April 1994 cannot properly be sustained in the context of a trespass action premised on the unauthorized plowing of snow in early March 1994.

Moreover, insofar as snow removal is concerned, not only is there nothing in the record which indicates that this action, in itself, caused any damage to the road bed or created the berm, but the record also establishes that BLM had, for many years, countenanced precisely the type of activity (clearing snow from the road) by local citizens which was cited as the basis for the trespass action against Caughman. Not only does Black expressly assert that he and his neighbors have been keeping the road cleared for over the last half-century, he actually claims (and this is unchallenged by BLM) that he hired a private company the previous year which constructed the water bars for which BLM is now seeking compensation. And there is corroboration for some of Black's claims in a record to the file, dated March 21, 1994, prepared by the BLM forester.

This record recounts a conversation between Black and the BLM forester which ensued after Caughman had received the Trespass Notice. The record indicates that, while Black was clearly convinced that the road had been plowed by Caughman so that Black could access his cabin, the BLM forester was not persuaded that this was the case. The record continues: "[Black] repeatedly asked for permission to plow again in the event of a heavy snowfall. I tried to sidestep the issue by saying realistically the road is now plowed and unless there is a very heavy snowfall to access their cabin won't take a plow."

What this note clearly shows is that, in an understandable desire to avoid conflicts with local landowners, the BLM forester intentionally refrained from telling Black that he could not plow the snow without an easement. But this action underscores precisely the problem which this trespass presents.

It is clear that, for many years, BLM has acquiesced in precisely the type of activity for which Caughman has been cited. Certainly, its past acquiescence does not require that it continue to do so indefinitely in the future, but we believe that, given this past course of conduct, BLM is properly required to inform the local landowners (as well as those likely to act on their behalf) that what had, in the past, been allowed will not be countenanced in the future. The forester's admitted reluctance to make this declaration to Black, even after Caughman had been cited, shows that BLM simply failed to convey its message to the local citizenry. While we believe that the notoriety of the instant case might be said to have disabused any local residents of misconceptions they had as to permissible activities in the future, they were clearly operating under a misapprehension, of which BLM was well aware, prior to Caughman's citation.

In light of the foregoing, we do not believe that any assessment is properly made with respect to Trespass Notice COC-54661, and we hereby reverse so much of the June 28, 1994, determination as directed the assessment of $1,194.07 for unauthorized road maintenance.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's determination regarding the timber trespass (CO-050-7463) is affirmed as to the fact of trespass but set aside and remanded for recomputation of damages, and its determination regarding the assessment of damages for right-of-way trespass COC-54661 is reversed.

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James L. Burski
Administrative Judge

I concur:

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James P. Terry
Administrative Judge